91-1426

No.

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
STAN M. HELFMAN
Supervising Deputy Attorney General
[Attorney of Record]
MICHAEL E. BANISTER
Deputy Attorney General
455 Golden Gate Ave., Room 6200
San Francisco, California 94102
Telephone: (415) 703-2064
Attorneys for Petitioner

QUESTION PRESENTED

Does a police officer's objectively reasonable belief that a person consented to an entry satisfy the Fourth Amendment and the deterrence purpose of the exclusionary rule, or must the state prove the person in fact knowingly consented?

Table of Contents

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
Procedural History	3
STATEMENT OF THE FACTS	5
Magistrate's Findings	7
Holding Of The Court Of Appeal	8
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	27

Table of Authorities

	Page
Cases	
Bumper v. North Carolina 391 U.S. 543 (1968)	8, 10, 14-16, 19, 21, 23
Colorado v. Connelly 479 U.S. 157 (1986)	15
Florida v. Bostick ___ U.S. ___ 111 S.Ct. 2382 (1991)	26
Florida v. Jimeno ___ U.S. ___ 111 S.Ct. 1801 (1991)	10, 12, 14, 15, 18, 19, 21, 23, 24
Illinois v. Rodriguez 497 U.S. ___ 110 S.Ct. 2793 (1990)	10, 12, 14-19, 21-24, 26
Johnson v. Zerbst 304 U.S. 458 (1938)	8
Michigan v. Tucker 417 U.S. 433 (1974)	20
People v. Gurley 23 Cal.App.3d 536 100 Cal.Rptr. 407 (1972)	21
People v. Henderson 568 N.E.2d 1234 (Ill. 1990)	18

Table of Authorities, cont'd

	Page
People v. Trujillo 217 Cal.App.3d 1219 266 Cal.Rptr. 473 (1990)	4
Schneckloth v. Bustamonte 412 U.S. 218 (1973)	9, 10, 14-21, 23, 24
State v. Brings Plenty 459 N.W.2d 390 (S.D. 1990)	18
State v. Grovier 808 P.2d 133 (Utah App. 1991)	18
State v. Paredes 810 P.2d 607 (Ariz.App. 1991)	18
Stone v. Powell 428 U.S. 465 (1976)	20
United States v. Lopez 911 F.2d 1006 (5th Cir. 1990)	17
United States v. Price 925 F.2d 1268 (10th Cir. 1991)	17
United States v. Shaibu 920 F.2d 1423 (9th Cir. 1990)	17
United States v. Towns 913 F.2d 434 (7th Cir. 1990)	17
Viveros v. State 799 S.W.2d 458 (Tex.App. 1990)	18

Table of Authorities, cont'd

	Page
Wilkerson v. State 594 A.2d 597 (Md.App. 1991)	18, 23

Statutes

28 U.S.C.	
§ 1257(a)	2
§ 2101(f)	2
§ 2254	3
California Health and Safety Code	
§ 11357, subd. (b)	3
§ 11378	3
California Penal Code	
§ 1538.5, subd. (f)	3
§ 1538.5, subd. (i)	3, 4

Court Rules

California Rules of Court	
rule 24(a)	2
rule 25(a)	2
rule 28(f)	2
Supreme Court Rules	
rule 13.1	2

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Sixth Appellate District, which was entered on September 4, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal is not reported. A copy of the opinion is attached to this petition as Appendix A. The California Supreme Court denied the state's Petition for Review on December 11, 1991. A copy of the order of denial is attached to this petition as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal was filed on September 4, 1991. The California Supreme Court denied review on December 11, 1991, at which time the judgment of the Court of Appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This petition for a writ of certiorari follows within 90 days of the latter date. 28 U.S.C. § 2101(f); Supreme Court Rules, rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

Procedural History

A complaint filed in the Santa Clara County, California, Municipal Court on October 13, 1989, charged respondent Stephen Ross Harden with possession of methamphetamine for sale and possession of marijuana. Cal. Health & Saf. Code, §§ 11357, subd. (b), 11378. CT 296-297.[1]

At the preliminary hearing and in the trial court, Harden moved to suppress evidence as the fruit of an illegal seizure. Cal. Pen. Code, § 1538.5, subd. (f) &

---

1. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript.

subd. (i). The magistrate and the trial court denied the motion. CT 1, 284-285, 292-294, 309, 350.[2/]

Harden pleaded guilty and was granted probation. CT 349, 353.

The California Court of Appeal, Sixth Appellate District, reversed the judgment on September 4, 1991. Appendix A.

The California Supreme Court denied petitioner's application for review on December 11, 1991. Appendix B.

---

2. Where, as here, the defendant makes a suppression motion at the preliminary hearing, California Penal Code section 1538.5, subdivision (i) makes the magistrate the fact finder and generally makes the magistrate's findings "binding" on the superior court in the event of a renewed pretrial suppression motion in that court. The superior court functions as a reviewing court on such a renewed motion, bound to resolve factual conflicts and draw inferences in favor of the magistrate's ruling. On further appellate review of a suppression motion, the state appellate courts must give the magistrate's express and implicit determinations the same deference formerly given them by the superior court. *People v. Trujillo*, 217 Cal.App.3d 1219, 1223-1224, 266 Cal.Rptr. 473 (1990).

Our statement of facts is from the evidence presented to the magistrate at the preliminary hearing. No additional evidence was presented on respondent's renewed motion in the superior court.

STATEMENT OF THE FACTS

In the early morning of October 11, 1989, four police officers responded to a report of suspicious activity in room 405 of the Woodmark Hotel in Santa Clara. CT 6-7, 76, 111-112. The officers testified that when they arrived at the room the door was ajar approximately one or one and a half inches. CT 7, 25, 74, 94, 167. Officer Henry knocked on the door. The force of the knock caused the door to open further. CT 7, 27-28, 74, 94, 167-168, 180. Through the partially open door, Officer Henry saw a person sitting or kneeling on the floor about four feet from the door. CT 167-169, 180. Officer Henry said, "Hello." Voices within answered back. Officer Henry announced they were police investigating a report of suspicious activities and asked for permission to enter. Two officers near the door heard one or two voices answer "yes." CT 8-9, 33-34, 169, 180. Other officers, farther back from the door, did not hear a response. CT 75, 84-85, 91, 94-95, 110.

Officer Henry stepped inside. CT 170, 209. James Bowen was sitting on the floor between the

doorway and the bed. Sindy Bowen was sitting on the bed. Stephen Harden was on the couch. CT 170-171, 207, 14-15, 67-68.

The officers saw in plain view marijuana cigarettes, loose green vegetable matter, an "Ohaus" scale, a police scanner, and a telephone paging device. CT 9-14, 49-41, 71, 80-81, 88, 171. Officer Henry asked for and received permission to search the room. CT 172, 182. The search produced marketable quantities of methamphetamine, drug packaging and cutting materials, and $1,500 in cash. CT 9-14, 37, 49-54. A search of respondent Harden incident to arrest produced two plastic baggies containing 14.5 grams of methamphetamine, marijuana cigarettes, $735 in cash, and an airline ticket to Las Vegas. CT 20-22, 44, 222-223.

The room's occupants testified that they did not hear any knock or announcement before the police officers entered. James Bowen testified that he heard his wife say, "Jimmy" before he saw the police officers in the room. CT 246, 249, 250-251.

The magistrate viewed the hotel room. CT 138. The magistrate directed the defense investigator to knock on the door while it was standing slightly ajar. Before the knocking, the magistrate could see light from the room through the space between the door and the jamb, but could not see the inside of the room. CT 146. When the employee knocked three times, the door opened one to one and a half inches, allowing a view into the room of about a quarter of an inch. Upon harder knocking, the magistrate could see slightly more of the room. CT 147-149.

Magistrate's Findings

The magistrate made the following findings: (1) Officer Henry knocked on the door, causing it to open "a couple of inches." (2) After the door opened, Officer Henry got a brief view of someone sitting on the floor who said "hello." (3) Officer Henry announced the officers' purpose and asked for permission to enter. (4) The officer believed he heard "yes" from within. CT 284-285.

The magistrate concluded that, whether or not an occupant actually said "yes," the officer's reasonable belief that he heard "yes" justified the police entry. CT 285.

Holding Of The Court Of Appeal

The court of appeal held: "When the People seek to justify a search on the ground consent was given, they have the burden of proving that the defendant's manifestation of consent was *knowingly, freely and intelligently* given. [Citation.] . . . Here, the People did not meet their burden of proving that consent was knowingly given, as the magistrate refused to find that defendants' testimony [that they had not given the officers permission to enter] was not credible." Typed opinion at p. 11, citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) and *Johnson v. Zerbst*, 304 U.S. 458 (1938); italics added.

REASONS FOR GRANTING THE PETITION

1. This Court has long recognized that consent searches are an important part of the standard investigatory techniques of law enforcement agencies. "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. . . . [A] search pursuant to consent may result in considerably less inconvenience for the subject of the search. . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-228 (1973).

In short, this Court has held that a consent search "is a constitutionally permissible and wholly legitimate aspect of effective police activity," *id.* at 228, and that

police officers who conduct a search based on consent act "reasonably," as required by the Fourth Amendment. "[W]e we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991).

Difficulty arises because no court can determine whether officers lawfully relied on consent without choosing between two conflicting standards enunciated by this Court. A court following the standard applied in *Bumper v. North Carolina*, *supra*, 391 U.S. at 543 and *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 218, must invoke the exclusionary rule if the state fails to prove the person *in fact* voluntarily consented. If the court chooses the test applied by this Court in *Illinois v. Rodriguez*, 497 U.S. ___, \110 S.Ct. 2793 (1990) and *Florida v. Jimeno*, *supra*, 111 S.Ct. 1801, it must not invoke the exclusionary rule if the state proves the officers acted reasonably in believing consent was given, even if the state fails to prove consent was actually given. Whether the evidence will be

excluded in a given case may be wholly dependent on the court's preference for one test over the other.

This Court should act now to ensure that police officers who act reasonably are no longer punished by courts that invoke the exclusionary rule believing that only proof of actual consent will satisfy the Fourth Amendment. This case squarely presents the issue for resolution. The magistrate admitted the evidence because the officers reasonably believed they received consent. The Court of Appeal excluded the evidence because the state failed to prove that knowing consent was actually given.

2. Presumably because it would be unreasonable to require law enforcement officers to divine the actual subjective intent or understanding of the person consenting, this Court has held that the Fourth Amendment permits officers to act if, on the totality of the circumstances known to them at the time, it is objectively reasonable for them to believe they have received consent.

In *Florida v. Jimeno*, *supra*, 111 S.Ct. at 1803-1804, this Court held that the *scope* of a consent to search must be measured by the objective reasonableness of the officer's conclusion that a consent to search a car included consent to search a closed bag within that car. "The touchstone of the Fourth Amendment is reasonableness. *Katz v. United States*, 389 U.S. 347, 360 (1967). The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. *Illinois v. Rodriguez*, 497 U.S. ___, 110 S.Ct. 2793 (1990). . . . The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would a reasonable person have understood by the exchange between the officer and the suspect?" 111 S.Ct. at 1804. *Jimeno* required no proof that the suspect intended to consent to a search of the bag in his car.

In *Illinois v. Rodriguez*, *supra*, 110 S.Ct. 2793, this Court upheld a warrantless entry by officers with an objectively reasonable belief that the person who consented to their entry had authority to consent, although

the person actually had no such authority at all: "*What [Rodriguez] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'* US Const, Amdt 4. . . . [I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government--whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement--is not that they always be correct, but that they always be reasonable." 110 S.Ct at 2799 (italics added).

The magistrate in this case carefully reviewed all of the circumstances known to the officers at the time of their entry into the motel room, even conducting a reenactment of the entry. He concluded that the officers reasonably believed they received consent to enter after requesting permission to do so, and that it was unnecessary for the state to prove that the occupants

actually consented to the entry. The magistrate applied the objective reasonableness test that this Court applied to police conduct in *Rodriguez* and *Jimeno*.

The California Court of Appeal overturned the magistrate's ruling solely because the state failed to prove that the defendant *in fact* gave consent, and therefore failed to prove defendant had knowingly consented. In so doing, the Court of Appeal applied an actual consent standard, as did this Court in *Bumper* and *Schneckloth*.

In *Bumper v. North Carolina*, *supra*, 391 U.S. at 543, this Court held that there is no consent where permission to enter results from unlawful coercion, and that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, *in fact*, freely and voluntarily *given*." *Id.*; italics added. This approach was followed in *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 248-249:

> We hold only that when the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate

> that the *consent was in fact* voluntarily given. . . . Voluntariness is a question of fact to be determined from all the circumstances . . . . *Id.*; italics added.

Application of the "consent in fact" test of *Bumper* and *Schneckloth* rather than the "objectively reasonable belief in consent" test of *Rodriguez* and *Jimeno* is significant. *Schneckloth* elaborated that: "The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was *in fact* voluntarily *given*," 412 U.S. at 248, and that, "in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly *vulnerable subjective state of the person who consents*." 412 U.S. at 229; italics added. *Contrast*: *Colorado v. Connelly*, 479 U.S. 157, 166 (1986).

Plainly, *Schneckloth* looks to the totality of the circumstances, but focuses on the consenting person's *subjective* state of mind; under *Schneckloth*, the question to be answered is, did that person *in fact* voluntarily consent.

In the nearly two years since this Court decided *Rodriguez*, the "consent in fact" test of *Bumper* and *Schneckloth* has continued to coexist, albeit uneasily, with the "objectively reasonable" test.

Like the magistrate and the Court of Appeal here, other courts have simply chosen sides. The courts that apply the *Bumper/Schneckloth* test require the prosecution to prove the suspect actually gave consent. These courts either ignore *Rodriguez* or confine it to the peripheral issue of apparent authority to consent. The cases that apply *Rodriguez* more broadly ignore *Schneckloth* or confine it to the issue of voluntariness.

Thus, in a recent post-*Rodriguez* case, the Ninth Circuit demanded proof of an "unequivocal and specific" consent "freely and intelligently given," and required the prosecution to present "convincing evidence that defendant

has waived his rights." *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990). In *United States v. Towns*, 913 F.2d 434, 442-443 (7th Cir. 1990), the Seventh Circuit cited *Rodriguez* in finding Towns had authority to consent, cited *Schneckloth v. Bustamonte, supra*, 412 U.S. 218, 219, for the general rule, and found Towns had not actually consented to the search.

Relying on *Schneckloth* after *Rodriguez*, the Tenth Circuit adopted the totality of circumstances test and reiterated the requirement that the prosecution prove the suspect gave actual consent that was "unequivocal and specific" and "freely and intelligently given." *United States v. Price*, 925 F.2d 1268, 1270-1271 and fns. 1 and 2 (10th Cir. 1991).

In *United States v. Lopez*, 911 F.2d 1006, 1011 (5th Cir. 1990), the Fifth Circuit upheld an entry by a police officer, on conflicting testimony whether consent was actually given. The court noted that, under *Schneckloth*, whether consent was given is a question of fact. The court held that it was reasonable for the officer to believe consent was given. The opinion omits mention

of *Schneckloth*'s requirement that the prosecution prove consent was, in fact, voluntarily given.

Post-*Rodriguez* decisions in several states exhibit similar confusion. *E.g.*, *State v. Paredes*, 810 P.2d 607, 610 (Ariz.App. 1991) ["state must establish by clear and positive evidence that consent to search was freely and intelligently given"]; *State v. Brings Plenty*, 459 N.W.2d 390, 399-400 (S.D. 1990) ["State has the burden of showing voluntariness by clear and convincing evidence that the search was the result of a free, intelligent, unequivocal and specific consent. . ."]; *Viveros v. State*, 799 S.W.2d 458, 461 (Tex.App. 1990); *State v. Grovier*, 808 P.2d 133, 136 (Utah App. 1991). In *People v. Henderson*, 568 N.E.2d 1234, 1254 (Ill. 1990), the Illinois Supreme Court held that *Rodriguez* controls where the issue is whether consent was given, but not where the issue is whether the consent was voluntary. In *Wilkerson v. State*, 594 A.2d 597, 602-606 (Md.App. 1991), a Maryland appellate court extended *Rodriguez* and *Jimeno* beyond apparent authority to consent and scope of consent, and applied the objective reasonableness standard where the existence of consent

was disputed: "The literal question, then, before the Court is not whether [defendant] voluntarily consented to the search of the automobile and the container on the back seat, but only whether [the police] reasonably believed he did." However, in arriving at this conclusion, the Maryland court simply ignored *Schneckloth* and *Bumper*, assuming, perhaps, that the actual consent test had been implicitly repudiated by *Rodriguez* and *Jimeno*.

3. The apparent contradiction between the "consent in fact" test of *Bumper* and *Schneckloth* and the "objectively reasonable" belief in consent test of *Jimeno* and *Rodriguez* must be directly addressed and resolved. If the Fourth Amendment requires only reasonableness on the part of police officers, continued application of the exclusionary rule by courts to enforce the *Bumper/Schneckloth* test disserves the interests of the Fourth Amendment. The exclusionary rule extracts a high price: It distorts the truth finding function of judicial proceedings because it requires exclusion of reliable evidence of crime, damages the community when it frees dangerous offenders, and generates disrespect for the law

and the administration of justice. *Stone v. Powell*, 428 U.S. 465, 490-492 (1976); *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 268-272 (conc. opn. of Powell, J.). Yet, exclusion cannot deter police officers who have acted reasonably, if mistakenly.

In *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), this Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or their future counterparts, a greater degree of care toward the rights of an accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

The deterrent effect of the exclusionary rule is weakest where the consented entry results from a reasonable police misapprehension of relevant facts. A

decision suppressing evidence cannot alter their perception of facts in future cases. As recognized in *People v. Gurley*, 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419 (1972):

> In the situation where the officers act reasonably on the evidence before them . . . the exclusion of evidence seized with [defendant's] apparent consent will not prevent similar conduct in the future under similar conditions. No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future.

4. Until the actual consent requirement of *Bumper* and *Schneckloth* is put to rest, *Rodriguez* and *Jimeno* will be understood by some courts as exceptions to an altogether different general rule. This Court should state that *Rodriguez* and *Jimeno* express basic Fourth Amendment jurisprudence. The California Court of Appeal's express rejection of the officer's objectively reasonable belief as justification for his entry squarely presents the question.

Maryland's appellate court may have assumed that the actual consent test had been repudiated by *Rodriguez*, but its opinion suggests the way to a reconciliation of this Court's two lines of authority. It observed that before *Rodriguez*,

> [m]any had viewed consensual searches as instances of Fourth Amendment waiver, as cases of the protection being rendered inapplicable by virtue of the voluntary consent of one authorized to give such consent. In that framework of analysis, consent was measured objectively from the vantage point of the hearing judge and on the basis of all historic data available at the time of the hearing. Was valid consent actually given by one actually authorized to do so?
>
> [*Rodriguez*,] however, conceptualized consent as a way of satisfying the Fourth Amendment merits, that is, as one of the recognized exceptions to the warrant requirement. To satisfy the warrant requirement or to satisfy any of its exceptions, of course, are ways of satisfying the Fourth Amendment

> commandment to be reasonable. In that framework of analysis, the issue of consent has to be viewed through the eyes of the policeman who conducts the search. What matters is not what the judge ultimately knows at the time of the hearing but rather what the policeman knew at the time of the search. The critical question is not whether voluntary consent had actually been given but only whether the policeman behaved reasonably in thinking it had.

Wilkerson v. State, *supra*, 594 A.2d at 603.

Bumper and *Schneckloth* can be reconciled with *Rodriguez* and *Jimeno* if it is recognized that each of these lines of authority speaks to a different audience.

Bumper and *Schneckloth* speak to the police officer. They describe what the officer in the field must do to satisfy the Fourth Amendment: The officer need not advise the person of a right to refuse consent, but the officer does *seek* actual knowing, voluntary consent. The officer determines, from the totality of the circumstances known to the officer at the time, whether he or she has obtained it. The officer takes into account a variety of

factors, including the person's intelligence level, educational level, and subjective vulnerability, *if* a reasonable person in the officer's position would have been aware of them. *Schneckloth* does not describe the function of the hearing judge; the court does not seek actual consent from the totality of circumstance made known to the court at the time of the hearing.

On the other hand, *Rodriguez* and *Jimeno* speak to judges, not to police officers. They describe the function of the court reviewing the officer's actions. The court does not require proof that the person in fact gave knowing consent, but only that the officer behaved reasonably in thinking he or she had.

Judged by this analysis, the standard applied by the Court of Appeal in this case was clearly erroneous. That court ruled that, absent proof of actual consent, the officer's belief, however reasonable, could not validate the search under the Fourth Amendment, and that the evidence must be suppressed.

On the record in this case, a reviewing court could conclude that substantial evidence supports the

magistrate's finding that Officers Henry and Vaden reasonably believed consent was given to enter the room. Officer Henry knocked on the door, said "Hello" to the occupant he saw when the door opened, explained the reason for the officers' presence, and asked for permission to enter to investigate. Both officers at the door testified that one or more occupants responded, "Yes." Indeed, one of the occupants testified his wife said, "Jimmy" before he saw the officers in the room. There is no evidence that the consent was obtained by coercion, duress, or during custody.

However, the Court of Appeal failed to determine whether the officers reasonably believed the room's occupants consented to the entry, because it ruled as a matter of law that the Fourth Amendment required the prosecution to prove the occupants actually consented, "knowingly, freely and intelligently." Since that ruling was based on a misapprehension of applicable principles, this Court should grant the petition for a writ of certiorari in

order to reconcile its two tests for lawful consent. *See Illinois v. Rodriguez*, *supra*, 110 S.Ct. at 2801-2802; *cf. Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. 2382 (1991).

CONCLUSION

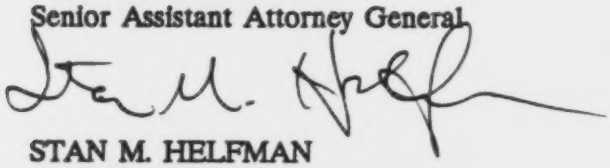
For the foregoing reasons, we respectfully request that the Petition for a Writ of Certiorari to the California Court of Appeal for the Sixth Appellate District be granted.

DATED: March 5, 1992.

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General



STAN M. HELFMAN
Supervising Deputy Attorney General
[Attorney of Record]
MICHAEL E. BANISTER
Deputy Attorney General

Attorneys for Petitioner

SMH:btr

APPENDICES

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	FILED: 9/4/91
Plaintiff and Respondent,	)	H007679
v.	)	(Santa Clara County Super. Ct.
STEPHEN HARDEN,	)	No. 138208)
Defendant and Appellant.	)	

On appeal after a plea of guilty to possession of methamphetamine for sale, defendant Stephen Harden claims the trial court erred in denying his motion to suppress evidence.

FACTS

At approximately 3:30 a.m. on October 11, 1989, Mary Camarena, night manager of the Woodmark Hotel in Santa Clara, telephoned police to report suspicious activity going on in room 405. She testified that the occupants of room 405, James and Sindy Bowen, had repeatedly left their room and returned during her 10:30

p.m. to 6:30 a.m. "graveyard" shift. She first saw them at 11:30 p.m. as they passed through the lobby. James left with someone other than defendant and drove off in a white Honda. Sindy left at the same time to retrieve something from a maroon or red Camaro parked in the parking lot. She immediately returned to her room.

At approximately 12:15 a.m., James returned. His companion was not with him. Forty-five minutes later, James left again. This time he asked Camarena if there was any way to enter the hotel other than through the main lobby. She told him there was not. At 2 a.m., James returned. Because the lobby doors were locked, Camarena had to let him in. Later that morning, Camarena heard a noise in the stairwell and went to investigate. There she found James. He was downstairs in the stairwell even though his room was upstairs, on the fourth floor. She gave him directions to this room, whereupon James told her he was going to try to get some sleep and asked for an 8 a.m. wake-up call.

During Camarena's shift, 19 to 20 outgoing phone calls were made from room 405. In addition, the hotel received six to eight calls from people asking for room 405. Because of the late hour, Camarena did not connect any caller who did not know the name of the occupants of room 405.

At 3 a.m., defendant knocked on the hotel's front door. He told Camarena he was there to give his boss, "Jimmy" in room 405, a ride to work. Camarena asked defendant what Jimmy's last name was, and he said "Lewis." Because he had given the wrong last name and because of the hour, Camarena refused to let him come in or call room 405. Camarena thought it suspicious that defendant "came at 3 o'clock in the morning to get his boss ready for work when earlier Mr. Bowen had asked for an 8 o'clock wake-up call, made a comment he was going to try to get some sleep . . . ." At that point, defendant crossed the street and went to a 7-Eleven store.

At 3:20 or 3:30 a.m., James returned to the lobby and told Camarena he was going to let defendant in. Camarena asked if he would be staying for the rest of the night because, if so, there would be a charge for an additional guest. James said they would be leaving soon.

At that point, Camarena called the police. San Jose Police Officers Henry, Vaden, Berchem and Warthan responded to the call at approximately 4 a.m. After speaking with Camarena, they went up to room 405. Vaden testified that when they arrived, the door "was slightly ajar about one to one and a half inches." He could not see inside the room, however. When Officer Henry knocked on the door, the force of his knock caused

the door to open approximately 10 inches. Talking through the open door, Henry told the occupants they were there on a report of "suspicious circumstances," and he asked for permission to enter. The door remained open 10 inches throughout the conversation. Vaden heard more than one voice give permission to enter.

Bercham and Warthan gave similar testimony, although they did not hear the occupants answer Officer Henry. Warthan testified that he had to close the door manually after the officers entered the room. Bercham stated that the conversation with the occupants lasted nearly a minute. When they entered the room, the officers saw contraband in plain view. During a subsequent search of the room and of defendant's person, the officers found marijuana, a scale, several baggies containing a white powdery substance, a pager, a police scanner, and over $2,000 in cash. Defendant and the Bowens were arrested.

At the preliminary hearing, defense counsel requested that the court, as trier of fact, view the scene, and the court granted the motion. At the scene, defendant's investigator testified that he examined the door to room 405 just 30 days after the arrest. He stated that the door was spring-loaded which caused it to close on its own. At the court's direction, the investigator

knocked on the door several times from a slightly ajar position. It opened at most one and one half inches. Furthermore, it closed automatically. It did not need to be manually closed as Officer Warthan testified he did in this case. The court noted that even when the door was knocked so hard that it opened one and one half inches, "the amount of light that is exposed or you can see during the knock from the edge of the doorjamb into the room" was only a quarter of an inch. Even "with a harder knock, it's not much more," the court observed.

In the next demonstration, defendant's investigator held the door open eight to ten inches, the distance the officers testified the door was open. The court noted than on both demonstrations, "the door once released came back to the original position of being adjacent to the doorjamb." The court also noted that when defense counsel opened the door wide enough to allow himself to go in, "the door closed behind him and completely closed including the latch mechanism engaging with the door inset . . . ."

While at the scene, the court heard the testimony of Woodmark Hotel's general manager. He stated that from the date of the arrest until that date, there had been no maintenance work done on the door to room 405. He testified that he would have been aware if repairs had

been done on the door. However, on cross-examination he admitted that there were situations where the maintenance person might notice something wrong and simply fix it without filling out a work order. He stated that he had seen doors that did "not come to a full closure," i.e., "might remain ajar." At that point, court adjourned and did not reconvene until two months later.

At the continued hearing, Officer Henry testified. He stated the door to room 405 was ajar when the officers arrived. He knocked twice, and the door opened approximately 10 inches. When it opened he saw James Bowen sitting on the floor. He did not "recall if the knock opened it completely by itself or when [he] saw the subject on the ground, that [his] hand went to the door . . . ." When asked if the door stayed open by itself, he responded, "It may have, I don't recall." He said "Hello" to the occupants, identified himself as a police officer and told them they were there to investigate some suspicious activity. He asked if they could enter and heard at least two voices say "yes." Once he heard "yes," all four officers entered.

Officer Henry admitted that another officer had told him about the demonstrations that took place at the hotel room. He said "that several people knocked on the door" and that "it opened a small amount." His source

did not "indicate [the door] opened ten inches and stayed open." He admitted he recalled "the admonishment of this court at the initiation of the preliminary hearing about all witnesses not to discuss any testimony amongst themselves during the course of the preliminary examination." Sindy Bowen's attorney asked that Henry's testimony about "maybe [holding] the door open" should be stricken because it contradicted the previous officers' testimony and Henry's police report. The court responded, "I'm going to allow it in but have it go to weight and the credibility."

Defendant Harden and co-defendants James and Sindy Bowen then took the stand and testified that they did not hear the police officers knock on the door or identify themselves before entering the room.

At the conclusion of the preliminary hearing, defendant made a motion to suppress the evidence pursuant to Penal Code section 1538.5 on grounds, inter alia, that defendant did not consent to the warrantless search. The court denied the motion, stating: "And concerning then the 1538.5 motion and the 844 violation, I think counsel are inferring that I'm either going to have to accept the defendant's story that there was only a closed door which was unlocked that the police entered or that the police version is true, that they knocked and it

swung open ten inches. I don't think I'm restricted to that. I think that if I give as much credence to both sides as possible, possibly what happened is that the officers arrived, knocked, the door might have moved. I do not believe it moved ten inches. It might have moved a couple of inches. There might have been a brief view of someone sitting on the floor by one of the officers. I believe the officers did make the announcement they were required to make. Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and therefore I accept the other side and make my decision based on that. I have to decide if there is sufficient evidence of compliance with the knock-notice rule, so that there was proper compliance, and I do find that there's enough evidence to determine there was compliance. There was a knock, there was an announcement of purpose, there was a -- even if the door opened on the knock, I do not consider that a breaking because if you knock on a door that is ajar and it opens, that is not an intent to enter, unless it is an intent to enter; in this case, I don't find it to be. I don't think the officer even knew what he would do when he knocked on it. Therefore I don't consider that a breaking. Before there was an entry, there was an

announcement of purpose; even though 'hello' was in there, I don't think that affects the sequence. Now whether the defendant said 'yes' when they said, 'may we enter or not,' if in fact the officer reasonably believed he heard it, I think that justifies the entry. [¶] So I'll deny the motion and find that the knock-notice, there's sufficient evidence to find that the knock-notice was complied with."

DISCUSSION

Defendant contends his motion to suppress should have been granted because the incriminating evidence was discovered during a nonconsensual warrantless search of the hotel room. He also contends that his pat-down was unlawful. Because we agree with the first proposition, we need not reach the second.

The principles governing review of a trial court's ruling on a motion to suppress are well-settled. (People v. Loewen (1983) 35 Cal.3d 117, 123.) The appellate court must defer to the express and implicit factual determinations of the magistrate if supported by the record. (People v. Trujillo (1990) 217 Cal.App.3d 1219, 1223-1224.) However, it need not defer to the magistrate's or superior court's conclusions of law. (People v. Williams (1988) 45 Cal.3d 1268, 1301; People v. Lawler (1973) 9 Cal.3d 156, 160.)

Here, defendant first made his suppression motion at the preliminary hearing. He brought the motion again before the superior court based on the preliminary hearing transcript and the factual findings of the magistrate. The superior court denied the motion without comment.

The issue revolves around what the magistrate's findings were. One clear finding was that he "[did] not believe [the door] moved 10 inches. It might have moved a couple of inches." Thus, the magistrate indicated he did not believe any of the four officers' testimony that the door was knocked open 10 inches. He also stated that "[t]here might have been a brief view of someone sitting on the floor . . . ." The "brief view" finding must have meant that the magistrate believed the door closed automatically, as it had in all the demonstrations. Again, the magistrate did not accept the officers' testimony that Henry talked to the occupants of room 405 through the open door for nearly a minute. The magistrate did, however, find that the officers made "the announcement they were required to make."

The magistrate next stated, "Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and

therefore I accept the other side and make my decision based on that. . . . [I]f in fact the officer reasonably believed he heard [permission to enter], I think that justifies the entry." The attorney general, in arguing that the magistrate found Officer Henry received valid consent to enter, stated: "Although not the most crystal-clear statement, the only rational interpretation of the magistrate's words is that he was making a factual finding that the officer heard what he thought was permission to enter." But "giv[ing] credence to the defendant's side of the story," the other rational interpretation of the magistrate's words is that he found the defendants did not actually give permission. The magistrate specifically refused to find that either the police or defendants were lying.

These were his factual findings, to which we must defer because they are supported by the evidence. We independently review, however, his conclusions of law. The magistrate concluded that the officer's belief that permission had been given was sufficient to justify a non-consented to, warrantless entry. We disagree.

"Under the [Fourth] [A]mendment, a warrantless entry by the police into a residence is at least presumptively unreasonable and therefore unlawful. [Citations.] [¶] The rule applies whether the entry is

made to search for evidence [citations] or to seize a person [citations]. It applies no less when, as here, the dwelling entered is a guest room in a hotel or motel. [Citations.]" (People v. Williams, supra, 45 Cal.3d at p. 1297.) "The defendant bears the burden of showing that the police officers acted unlawfully. [Citation.] When the defendant has shown a warrantless entry, the burden shifts to the prosecution to prove that the entry was nevertheless reasonable. [Citations.] The prosecution must show, for example, the presence of exigent circumstances -- a burden that is heavy indeed. [Citations.] [¶] If the prosecution fails to carry its burden, the defendant need do nothing more to be entitled to suppression of the primary evidence . . . ." (Id., at p. 1300.)

The only potential exception to the warrant requirement applicable to this case is consent. That is the basis upon which each of the officers justified his entry into room 405. However, the court specifically refused to find that defendants were lying when they unequivocally testified that they had not given the officers permission to enter. Moreover, two of the officers testified that they did not hear any response from the occupants of room 405.

When the People seek to justify a search on the ground consent was given, they have the burden of proving that the defendant's manifestation of consent was knowingly, freely and intelligently given (Bumper v. North Carolina (1968) 391 U.S. 543, 548). Consent will not be lightly inferred. (Johnson v. Zerbst (1938) 304 U.S. 458.) Whether consent was freely given must be determined by the facts and circumstances of each individual case. (People v. Challoner (1982) 136 Cal.App.3d 779; People v. James (1977) 19 Cal.3d 99, 106.) Here, the People did not meet their burden of proving that consent was knowingly given, as the magistrate refused to find that defendants' testimony was not credible. Where, as here, "the prosecution fails to carry its burden, the defendant

need do nothing more to be entitled to suppression of the primary evidence . . . ." (People v. Williams, supra, 45 Cal.3d at p. 1300.)

The judgment is reversed.

Cottle, J.

WE CONCUR:

Agliano, P. J.

Elia, J.

People v. Harden
H007679

APPENDIX B

Sixth Appellate District No. H007679
S023352

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

Filed: 12/11/91

v.

STEPHEN HARDEN, Appellant

Respondent's petition for review DENIED.

LUCAS
Chief Justice

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAY 14 1992
OFFICE OF THE CLERK

ORIGINAL (2)

RESPONSE REQUESTED
Corrected Form 1
affidavit

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE
PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

32 pp

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

Stephen P. Harden, the respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provision of Title 28, United States Code, section 1915, and Rule 39 of this Court, and to file herein his response to the petition for writ of certiorari to California Court of Appeal, Sixth District filed by petitioner in single counterpart, without printing the same. The typed brief of respondent in opposition is presented herewith for filing.

The affidavit of counsel for respondent in support of this motion is filed herewith.

Dated May 14, 1992.

Respectfully submitted,

RUDOLPH G. KRAFT, III
P.O. Box 225
Cutten, CA 95534
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE
PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408) 241-6171

Attorneys for Respondent

State of California

County of Humboldt

Rudolph G. Kraft, III, being duly sworn, on oath deposes and says:

1. He is the attorney for respondent in the above-entitled action and makes this affidavit in support of the respondent's motion for leave to proceed in forma pauperis herein.

2. This court ordered respondent to file a response to petitioner's petition for a writ of certiorari to the California Court of Appeal, Sixth District.

3. Respondent is unable because of his poverty to pay fees and costs of this case or give security therefor.

4. Respondent's attorney fees and costs on appeal have been paid by the State of California on account of respondent's poverty.

I swear under penalty of perjury that the foregoing is true and correct.

RUDOLPH G. KRAFT, III.
Attorney for Respondent

Subscribed and sworn to before me this 13th day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996

QUESTION PRESENTED

In addition to the question presented in the petition, respondent suggests the following additional question:

Should this court consider an issue which was not raised at the trial court or on appeal?

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
THE TESTIMONY OF THE OFFICERS	3
THE DEFENDANTS' TESTIMONY	4
UNDISPUTED FACTS	4
MAGISTRATE'S FINDINGS	6
ARGUMENT	10

TABLE OF AUTHORITIES

	PAGE
CODES	
U.S.C. Section 1257, subsection (a)	1
California Health and Safety Code	
Section 11377, subsection (b)	2
Section 11378	2
California Penal Code	
Section 844	6, 7
Section 1531	6
Section 1538.5, subsection (a)	6
Section 1538.5, subsection (f)	2, 7
Section 1538.5, subsection (i)	2, 7
CASES	
Illinois v. Rodriguez 497 U.S. ___, 111 L.Ed.2d 148 (1990)	12, 13
Florida v. Jimeno, 500 U.S. ___, 114 L.Ed.2d 297 (1991)	12, 13
Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973)	12, 13
United States v. Lopez, 911 F.2d 1006 (5th Cir. 1990)	13, 14

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, Sixth Appellate District, is unreported. A copy of the opinion is attached to the petition as Appendix A. The California Supreme Court's denial of petitioner's Petition for Review is attached to the Petition as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The petition involves the Fourth Amendment to the United States Constitution. That provision is set forth at page three of the petition.

STATEMENT OF THE CASE

Respondent Stephen Ross Harden, (hereafter "respondent) was charged with possession of methamphetamine for sale and possession of less than one ounce of marijuana. California Health and Safety Code section 11378 and section 11377(b). Clerk's Transcript, hereafter "CT", 296-297. Pursuant to California Penal Code section 1538.5(f) and (i) respondent moved at his preliminary hearing and again in the trial court to suppress the evidence against him as the fruit of an illegal search and seizure. Both courts denied respondent's motion. CT 1, 284-285, 292-294, 309, 350.

Subsequently, respondent pled guilty and was granted probation. CT 349, 353.

The California Court of Appeal, Sixth Appellate District, reversed the judgment on September 4, 1991. Petition Appendix A. The California Supreme Court denied petitioner's application for review on December 11, 1991. Petition Appendix B.

STATEMENT OF FACTS

Petitioner's Statement of Facts is generally accurate as a summary of the testimony heard by the magistrate. However, petitioner's Statement of the Facts implies that the complete testimony of the four police officers was accepted as accurate by the magistrate and the California Court of Appeal. This is not true. In fact, one of the most significant problems with this case is that the magistrate's ambiguous and incomplete findings of fact make it difficult to know exactly what testimony was believed by the magistrate. Respondent's Statement of Facts will attempt to clarify which "facts" are undisputed and which "facts" arise out of contradicted testimony.

THE TESTIMONY OF THE OFFICERS

On October 11, 1989, four Santa Clara police officers responded to a report of suspicious activity by the occupants of room 405 of the Woodmark Hotel. The night manager of the hotel made the report. Ct 6-7, 76, 111-112. The door to room 405 "was slightly ajar about one to one and a half inches." Ct 7, 25, 74, 167. "The outside edge of the door [was] even with the inside edge of the door jam." Ct 94. With the door in this position it was not possible to see into the room. Ct 7, 94. Officer Henry knocked on the door and the door swung open ten inches. Ct 7, 84, 94, 98, 168. Officer Henry saw someone sitting on the floor. Henry said "Hello," identified himself as a police officer investigating a report of suspicious circumstances, and asked permission to enter the hotel room. CT 8-9, 33-34, 169, 180.

Henry and another officer heard the occupants of the room give permission to enter; the other two officers who were further away, did not. CT 9, 33, 169, 75, 85, 94-95, 110.

The four officers entered the room. CT 9, 67, 94. The last officer to enter testified that he closed the door because it otherwise would have remained open. CT 96, 98. Petitioner, his two co-defendants, James Edward Bowen and Sindy Charlene Bowen and the Bowen's baby, were in the room. CT 14, 168-170. The officers noticed various items indicative of drug possession. CT 9-14, 71, 95-97, 171-172. Henry asked if there were any drugs in the room and was told "no." He asked Mr. Bowen for permission to search the room and was told "yes." CT 172.

The search of the room located both marijuana and methamphetamine. CT 18-20, 68-70, 106-108, 228.

THE DEFENDANTS' TESTIMONY

All three defendant's testified that they did not see the police officers or hear them knock on the door or identify themselves before entering the room. CT 246-251.

UNDISPUTED FACTS

On March 9, 1990, as part of the preliminary hearing, the magistrate conducted a view of the scene. CT 137,140. During this view, respondents investigator, Ken Condo, testified that he visited the Woodmark Hotel on November 10, 1989. He determined that the door to room 405 was a spring-loaded door which, when released, closed on its own. CT 144. Condo reenacted the officers' testimony by knocking on the door, but it did not swing

open 8 to 12 inches as described by the officers. CT 144-145. Instead, the door opened only an inch to an inch and a half before returning to its starting position. CT 146-147. Another harder knock did not open the door any further. CT 148. Even though the door swung open an inch and a half from its fully closed position, "the amount of light that is exposed or you can see during the knock from the edge of the doorjamb into the room" was only a quarter of an inch. CT 148-149. Appellant's attorney opened the door wide enough to permit entry. When released, the door closed on its own completely "including the latch mechanism engaging with the door inset." A repeat performance achieved the same result. CT 150.

The general manager of the hotel testified that the condition of the door had not changed since November 10th and that Condo had not tampered with the door at that time. Further, the manager was unaware of any maintenance work performed on the door since October 11, 1989. CT 153-154.

MAGISTRATE'S FINDINGS

Pursuant to California Penal Code section 1538.5[1] respondent challenged the entry into the hotel room as a violation of his Fourth Amendment rights.[2] Respondent's claim had two distinct components. Respondent alleged that the police had failed to comply with California's knock-notice statues[3] and that the entry itself violate respondent's Fourth Amendment rights. The magistrate ruled against respondent, but its ruling was based primarily on the officers' purported compliance with

---

[1] California Penal Code section 1538.5, subsection (a) provides:

A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

***

[2] Respondent also challenged the search of his person. The Court of Appeal did not reach this second issue and the issue is not before this court.

[3] California Penal Code section 844 provides:

To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.

California Penal Code section 1531 provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

the knock notice statutes.

Petitioner's summary of the magistrate's findings is incomplete and presents the findings in a light highly favorable to its position without capturing the true flavor of ambiguity present in the magistrate's actual statement. The magistrate's actual findings were as follows:

> And concerning then the 1538.5 motion and the 844 violation, I think counsel are inferring that I'm either going to have to accept the defendant's story that there was only a closed door which was unlocked that the police entered or that the police version is true, that they knocked and it swung open then inches. I don't think I'm restricted to that. I think that if I give as much credence to both sides as possible, possibly what happened is that the officers arrived, knocked, the door might have moved. I do not believe it moved ten inches. It might have moved a couple of inches. There might have been a brief view of someone sitting on the floor by one of the officers. I believe the officers did make the announcement they were required to make. Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and therefore I accept the other side and make my decision based on that. I have to decide if there is sufficient evidence of compliance with the knock-notice rule, so that there was proper compliance, and I do find that there's enough evidence to determine there was compliance. There was a knock, there was an announcement of purpose, there was a -- even if the door opened on the knock, I do not consider that a breaking because if you knock on a door that is ajar and it opens, that is not an intent to enter, unless it is an intent to enter; in this case, I don't find it to be. I don't think the officer even knew what he would do when he knocked on it. Therefore I don't consider that a breaking. Before there was an entry, there was an announcement of purpose; even though "hello" was in there, I don't think that affects the sequence. Now whether the defendant said "yes" when they said, "may we enter or not," if in fact the officer reasonably believed he heard it, I think that justifies the entry.
>
> So I'll deny the motion and find that the knock-notice, there's sufficient evidence to find that the

knock-notice was complied with.

CT 284-285.

In addition, the court made factual findings concerning room 405 during the view of the scene. CT 146-153. These findings are reflected in the summary of undisputed facts above.

Petitioner explicitly states four factual findings purportedly made by the magistrate. Petition at 7. This summary is not accurate.

(1) The magistrate stated that the door "might have moved a couple of inches." CT 284 (Emphasis added.) The magistrate did not find that it did move a couple of inches. In the context of the magistrate's findings at the view of the scene where the door moved no more than an inch and a half even after a hard knock, it seems likely that the two inch figure was merely the magistrate's generous statement of the most the door could possibly have moved under any circumstances.

(2) Again, the magistrate stated that "there might have been a brief view of someone sitting on the floor." CT 284. (Emphasis added.) Furthermore, Officer Henry testified that he said "Hello" not that the person sitting on the floor said "Hello" as alleged by petitioner. CT 169, 180.

(3) & (4) Petitioner states that the magistrate found that "Officer Henry announced the officers' purpose and asked for permission to enter" and that the "officer believed he heard 'yes' from within." Petition at 7. However, when the magistrate stated that "the officers did make the announcement they were

required to make," he did so in the context of ruling that the officers had complied with the knock-notice rules, not in the context of holding that they asked for and received permission to enter. The magistrate's finding on the question of consent to enter was less decisive. The magistrate stated "[p]ossibly the officers heard what they thought was yes" and concluded that "if in fact the officer reasonably believed he heard [consent to enter], I think that justifies the entry." CT 285. However, the magistrate never explicitly found that the officers reasonably believed that they had received the consent to enter because it resolved the matter merely by finding compliance with the knock-notice rules. CT 285.

REASONS FOR DENYING THE PETITION

1. In its arguments before the magistrate and in its respondent's brief filed with the Court of Appeal, petitioner argued only that the defendants had consented to the police entry into the hotel room. Petitioner's argument that the entry could be justified based upon the police officers' reasonable belief in the existence of consent was first raised in petitioner's petition for review filed with the California Supreme Court.

According to California Rules of Court 29, subsection (b):

> As a matter of policy, on petition for review the Supreme Court normally will not consider:
>
> (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal
>
> (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in the petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

Thus, under California law, an issue that is not raised until after the Court of Appeal reaches its decision is considered waived and will not be considered by the California Supreme Court. See Estate of MacDonald, 51 Cal.3d 262, 267 n. 5 (1990) and People v. Cookson, 54 Cal.3d 1091, 1100 (1991). Furthermore, insofar as petitioner objects to the statement of facts in the opinion of the Court of Appeal, petitioner has waived any such objection by failing to file a petition for rehearing in that court. Because this issue was not raised in a timely fashion

before the California courts, this court should also decline to consider it.

2. Because the facts of this case are very confused it does not represent an appropriate vehicle for consideration of the issue raised by petitioner. The fact-finding magistrate reached his decision without directly considering the legality of the entry because he focused on the police officers' compliance with the California knock-notice statutes. In doing so, the magistrate failed to make the clear factual findings necessary to a proper resolution of the issue raised by petitioner.

As indicated in respondent's statement of facts, respondent argued this case before the magistrate both as an illegal entry and as a violation of California's knock-notice statutes. Apparently, the magistrate concluded that the officers had complied with the knock-notice rules and never explicitly ruled on whether the officers had received consent to enter. In fact, the magistrate expressly refused to make explicit factual findings on the credibility of the witnesses and their conflicting testimony on the question of consent.

On appeal, respondent did not raise the knock-notice issue because it did not appear relevant. The California knock-notice statutes apply only when officers are entering a residence to make an arrest or pursuant to a warrant. At the time of their initial entry, these officers had no warrant and no probable cause to arrest. Thus, the issue is not their compliance with the knock-notice statutes, but the legality of the entrance

itself -- specifically the existence or lack thereof of consent to enter.

In its opinion, the California Court of Appeal focused on the magistrate's express refusal to find the defendant's testimony not credible. Based upon this refusal, the Court of Appeal properly concluded that the State of California had not met its burden of proving that the officers had received consent to enter. Petition at A-13. Petitioner's arguments notwithstanding, the Court of Appeal never expressly ruled that the police officers reasonably believed they had received consent to enter. The Court of Appeal merely disagreed with the magistrate's conclusion "that the officers' belief that permission had been given was sufficient to justify a non-consented to, warrantless entry." Petition at A-11. However, this disagreement is a far cry from finding that the officers believed that they had received consent to enter, much less that their belief was reasonable.

In fact, a review of the evidence suggests that no reasonable belief that consent had been given could possibly exist. As stated by the Court of Appeal, "[t]he magistrate specifically refused to find that either the police or defendants were lying." Petition at A-11. The defendants testified that they did not hear, see, or speak with the police officers prior to the officer's entry into the hotel room. Apparently, the magistrate believed this testimony. The magistrate also found that the door to room 405 had not swung open 10 inches as claimed

by the officers. Thus, according to the Court of Appeal, "the magistrate indicated that he did not believe any of the four officers' testimony that the door was knocked open ten inches." Petition at A-10. If the door did not swing open 10 inches, the entire version of the events described by the officers is suspect. Under these circumstances it is hard to imagine how these police officers could have held a reasonable belief that they had received consent to enter.

3. Petitioner argues that under current law courts have difficulty determining "whether officers lawfully relied on consent' to enter because they must choose "between two conflicting standards enunciated by this Court." Petition at 10. Petitioner is incorrect. This court has not announced two conflicting standards.

Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) states the general rule concerning the validity of a consensual search:

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Petitioner suggests that this rule somehow conflicts with two recent cases: Illinois v. Rodriguez 497 U.S. ___, 111 L.Ed.2d 148 (1990) and Florida v. Jimeno, 500 U.S._____, 114 L.Ed.2d 297 (1991). Respondent finds no conflict between Schneckloth, Rodriguez, and Jimeno.

In Rodriguez, police gained entry into the defendant's apartment with the assistance and consent of the defendant's ex-

girl friend who did not, in fact, have the authority to give such consent. 111 L.Ed.2d at 155-156. This court reversed the lower court and held that "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so. 111 L.Ed.2d at 155.

Similarly, in Jimeno this court ruled that when a defendant consents to a search of his car the Fourth Amendment is not violated by a search of a closed container in the car when: "it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." 114 L.Ed.2d at 301.

Petitioner claims that Rodriguez and Jimeno establish an alternative reasonableness test for the existence of consent -- a test petitioner claims conflicts with Schneckloth. Petitioner is mistaken, however. In Rodriguez and Jimeno the police actually received consent meeting the requirements of Schneckloth -- consent that was "in fact voluntarily given." The disputed issue in Rodriguez and Jimeno concerned the authority of the consenter to give consent and the scope of the consent, respectively. This court's rulings on how these distinct issues should be resolved does not indicate the existence of a second consent test which conflicts with Schneckloth.

Petitioner claims that the two consent tests have coexisted over the past two years with the various courts simply choosing sides as to which test to apply. Petition at 16. In support of

this contention petitioner cites a number of cases. However, only three of these cases are cited by petitioner as using the Rodriguez test to the exclusion of the Schneckloth test and only one of these cases actually does so. Furthermore, in none of these cases would the strict application of the Schneckloth test have produced a different result.

Petitioner cites United States v. Lopez, 911 F.2d 1006 (5th Cir. 1990), as a case where "[t]he court held it was reasonable for the officer to believe consent was given" and where "[t]he opinion omits mention of Schneckloth's requirement that prosecution prove consent was, in fact, voluntarily given." Petition at 17-18. Petitioner's summary of Lopez is misleading and incomplete. In Lopez the border patrol agent testified that the defendant had consented to the search. The defendant testified that he had not. The magistrate believed the agent. Thus, Lopez is not a case of reasonable belief in consent versus actual consent, but a case where both are present. More importantly, petitioner's claim that Lopez omitted mention of the Schneckloth test is not correct. In fact Lopez cites Schneckloth:

> A search by consent is a well-recognized exception to the usual warrant requirement. Schneckloth v. Bustamonte, 413 U.S. 218, 218-219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973); United States v. Davis 749 F.2d 292, 294 (5th Cir. 1986). Such consent must be given voluntarily and not simply in acquiescence to a claim of lawful authority, see Schneckloth, 412 U.S. at 248, 93 S.Ct. at 2058; and a determination that consent was voluntarily given is a finding of fact to be made in light of all the circumstances. Schneckloth, 412 U.S. at 248-9, 93 S.Ct. at 2058-59; United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir.

1990).

911 F.2d at 1010.

Lopez does not support petitioner's claim that courts are choosing sides or that the Fifth Circuit has chosen to apply a new Rodriguez test instead of the Schneckloth test.

According to petitioner, in People v. Henderson, 568 N.E.2d 1234, 1254 (Ill. 1990), the Illinois court ruled that "Rodriguez controls where the issue is whether consent was given, but not where the issue is whether the consent was voluntary." Petition at 18. Although petitioner accurately summarizes the holding of the Illinois court, the court did not actually have to consider the reasonableness of the police officers' actions. In Henderson the defendant's mother was found to have consented to a police entry based upon her gestures and actions while remaining silent. In other words, based upon a reasonable interpretation of defendant's mother's actions the Illinois courts found that consent to enter had actually been given. Thus, the reasonableness of the polices' beliefs was not relevant to any issue in Henderson and the Illinois court did not use a new, distinct Rodriguez test that conflicts with Schneckloth.

Similarly, Wilkerson v. State, 594, A.2d 597 (Md.App.1991), involved a case where consent to search the defendant's car had actually been given. At the suppression hearing, the defendant claimed that "he wanted to revoke [the consent]...but did not feel free to do so." 594 A.2d at 604. Obviously, in the absence of any explicit revocation the defendant's consent remained

valid. The court relied upon Rodriguez to establish that it was reasonable to rely upon the actual, voluntary consent given by the driver of a car to a search of that car. The defendant also argued that the consent to search the car did not include consent to search containers within the car. However, the Maryland Court rejected this argument in direct reliance on Jimeno. 594 A.2d at 604-605. The Maryland Court made expansive statements in reliance on Rodriguez and Jimeno, that after Rodriguez the question is not whether the defendant voluntarily consented to the search of his car, but whether the police officer reasonably believed the defendant had consented to the search. 594 A.2d at 602-603. These statements were misguided and unnecessary. In Wilkerson, the driver actually and voluntarily consented to a search of the car including containers within the car. No examination of the reasonable beliefs of the police officer was warranted or necessary.

Petitioner's attempt to apply the rule of Rodriguez and Jimeno to this case arises out of a fundamental misinterpretation of the nature of the Fourth Amendment. Petitioner understands the Fourth Amendment to permit consensual searches whenever a police officer reasonably believes he has received consent to conduct a search. However, as explained in Jimeno:

> The touchstone of the Fourth Amendment is reasonableness. Katz v. United States, 389 US 347, 360, 19 L.Ed.2d 576 88 S.Ct. 507 (1967). The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. Illinois v. Rodriguez, 497 US--, 111 1.Ed.2d 148, 110 S.Ct. 2793 (1990). Thus, we have long approved consensual searches because it is not doubt

> reasonable for the police to conduct a search once they have been permitted to do so. Schneckloth v. Bustamonte, 412 US 281, 219, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect? Illinois v. Rodriguez, supra at ----, 111 L.Ed.2d 148, 110 S.Ct. 2793; Florida v. Royer, 460 US 491, 501-502, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983) (opinion of White, J.); id., at 514, 75 L.Ed.2d 229, 103 S.Ct. 1319 (Blackmun, J., dissenting).

114 L.Ed.2d at 302.

In other words, the constitutionality of a search under the Fourth Amendment is based not upon reasonableness of the police officer's beliefs or actions but upon the reasonableness of the search itself. Obviously, in many cases the two will coincide. Unreasonable police actions will usually lead to unreasonable searches and seizures. Reasonable police behavior will usually lead to reasonable searches and seizures. But not all cases fit this usual pattern and this is one of the unusual cases. Even if the police reasonably believe they had received consent to enter the hotel room, this the search was not reasonable. The "typical reasonable person" described in Jimeno would not have found the entry into the hotel room reasonable when the occupants of the room credibly testified that they did not see or hear the police officers prior to their entry into the room.

4. Petitioner suggests that Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797 (1968) and Schneckloth can be reconciled with Rodriguez and Jimeno by assuming that Bumper and Schneckloth speak to police officers while Rodriguez and Jimeno speak to

judges. As discussed above, the conflict between these cases is more in petitioner's mind than in the cases themselves. However, even if the conflict were real, petitioner's suggested solution is no solution at all. Jimeno, for example, clearly speaks to police officers, as well as judges, by telling them that under normal circumstances a consent to search a car for drugs includes consent to search containers within the car.

More importantly, petitioner's suggestion that courts should not attempt to determine whether a person knowingly and voluntarily consented to a search threatens to eviscerate the Fourth Amendment. If the only test a court can apply to determine the legality of a search is whether the police behaved reasonably, the scope of the amendment will be steadily eroded under the pressures of creeping reasonableness. Every borderline search or seizure which is upheld as reasonable will establish a new standard of reasonable behavior, pushing back the range of acceptable behavior until the next case comes along to establish yet another clear and more expansive example of reasonable behavior.

5. Finally, the various legal issues and arguments in this case should not distract this court from one central fact. The view of the scene and the magistrate's findings clearly established that the police officers testified to events that did not and could not have happened. The magistrate went out of his way to avoid stating that the police officers lied, but that does not change the underlying reality of the situation. Under such

circumstances this court should not ever consider taking this case. To do so would send an appalling message to law enforcement personnel throughout the country that the United States Supreme Court does not care whether police officers testify honestly and accurately.

CONCLUSION

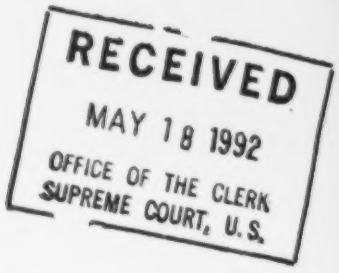
For the reasons discussed above, we respectfully request the that Petition for Writ of Certiorari be denied.

May 14, 1992

RUDY KRAFT

SIXTH DISTRICT APPELLATE PROGRAM

Attorneys for Respondent



No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

CERTIFICATE OF SERVICE BY MAIL OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS BY RESPONDENT

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408)

Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

RUDY KRAFT, counsel for respondent, states:

1) That his membership application to the Bar of the Supreme Court of the United States is submitted contemporaneously herewith;

2) That his business address is P.O. Box 225, Cutten, California, 95534-0225 in the City of Cutten, and County of Humboldt, State of California; that on May 14, 1992, he served true copies of the attached Motion for Leave to Proceed in Forma Pauperis by Respondent in the above-entitled matter on counsel for the petitioner by placing same in an envelope addressed as follows:

Michael E. Banister
Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Said envelope was then sealed and deposited in the United Stated mail at Cutten, California with the postage thereon fully prepaid.

I swear under penalty of perjury that the foregoing is true and correct.

RUDY KRAFT
Attorney for Respondent

Subscribed and sworn to before me this 14 day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996

No. 91-1426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

STEPHEN ROSS HARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE COURT

CERTIFICATE OF SERVICE BY MAIL OF RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUDY KRAFT
P.O. Box 225
Cutten, CA 955334
(707) 445-5486
(Counsel of Record)

SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd.
Santa Clara, CA 95050
(408)

Attorneys for Respondent

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

RUDY KRAFT, counsel for respondent, states:

1) That his membership application to the Bar of the Supreme Court of the United States is submitted contemporaneously herewith;

2) That his business address is P.O. Box 225, Cutten, California, 95534-0225 in the City of Cutten, and County of Humboldt, State of California; that on May 14, 1992, he served true copies of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for the petitioner by placing same in an envelope addressed as follows:

Michael E. Banister
Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102

Said envelope was then sealed and deposited in the United Stated mail at Cutten, California with the postage thereon fully prepaid.

I swear under penalty of perjury that the foregoing is true and correct.

RUDY KRAFT
Attorney for Respondent

Subscribed and sworn to before me this 14 day of May, 1992.

CHRISTINE SINTIC
Comm. # 963686
NOTARY PUBLIC - CALIFORNIA
Humboldt County
My Comm. Expires Apr. 6, 1996

(3)

No. 91-1426

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
STAN M. HELFMAN
Supervising Deputy Attorney General
[Attorney of Record]
MICHAEL E. BANISTER
Deputy Attorney General
455 Golden Gate Ave., Room 6200
San Francisco, California 94102
Telephone: (415) 703-2064
Attorneys for Petitioner

Table of Contents

	Page
JURISDICTION	1
ARGUMENT	1
THE ISSUE OF WHETHER AN ENTRY WAS JUSTIFIED BY A LAW ENFORCEMENT OFFICER'S REASONABLE, BUT MISTAKEN, BELIEF THAT CONSENT WAS GIVEN WAS RAISED AND DECIDED BELOW	1
CONCLUSION	7

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

REPLY TO BRIEF IN OPPOSITION

JURISDICTION

Petitioner files this reply brief pursuant to rule 15.6 of the Supreme Court Rules.

ARGUMENT

THE ISSUE OF WHETHER AN ENTRY WAS JUSTIFIED BY A LAW ENFORCEMENT OFFICER'S REASONABLE, BUT MISTAKEN, BELIEF THAT CONSENT WAS GIVEN WAS RAISED AND DECIDED BELOW

Respondent contends in his Brief in Opposition that petitioner did not raise the argument at issue here until filing the Petition for Review in the California Supreme Court: "In its arguments before the magistrate and in its respondent's brief filed with the Court of Appeal, petitioner argued only that the defendants had consented to the police entry into the hotel room. Petitioner's argument that the entry could be justified based upon the police officers' reasonable belief in the existence of consent was first raised in petitioner's petition for review filed with the California Supreme Court." Brief in Opposition at 10. Respondent is mistaken. The issue

we present here was raised and briefed by both parties in the state Court of Appeal and was addressed in that court's opinion.

Argument IB of our brief before the Court of Appeal was captioned: "Officer Henry Asked For and Received Valid Consent To Enter The Room." Respondent's Brief at 12. In support of our argument that the officers' entry was justified, we stated:

> "On the question of consent, the magistrate stated, 'Now whether the defendant said "Yes" when they said, "May we enter or not," if in fact the officer reasonably believed he heard it, I think that justifies that entry.' [Citation.] Although not the most crystal-clear statement, the only rational interpretation of the magistrate's words is that he was making a factual finding that the officer *heard what he thought was permission to enter.* The magistrate implicitly found that belief to be reasonable, but acknowledged that reasonableness was a question of law which would be later re-determined by a reviewing court. In this way, the magistrate could 'still give credence to the

defendant's side of the story' [citation] by finding that, '[p]ossibly the officers heard what they thought was yes.' [Citation.] The magistrate was using the words 'possibly' and 'if' to say, in effect, '*Given* that the officers heard something, and that it is *possible* that they thought they heard words of permission, the question is one of *reasonableness*, about which the reviewing court will have the final say.' Keeping in mind that the defense motion was denied, it logically follows that the magistrate found Officer Henry's belief reasonable, and that there was therefore valid consent given."

Id., n. 3; emphasis in original.

Not only did we *raise* the issue of the officer's reasonable belief, but respondent *countered* our argument in his reply brief in the state Court of Appeal by reiterating his earlier contention in the Appellant's Opening Brief:

"As discussed on page 16 of Appellant's Opening Brief, the magistrate merely found that the officers reasonably believed that they had consent to enter and that belief

justified their entry. The magistrate's failure to make a necessary finding of fact mandates reversal.

[¶] . . . .

Apparently, respondent contends that if an Officer subjectively believes (correctly or incorrectly) that he had received consent to enter, then any ensuing entry is legal. Respondent cites no law in support of this position. Although consent may make a warrantless search reasonable under the Fourth Amendment, a factual finding that there was actual consent is a prerequisite to such a conclusion. Whether an officer subjectively 'believed' he had consent to enter cannot be equated with actual consent. . . .

Furthermore, based upon the facts of this case, no reasonable fact finder could have found that the officers received consent to enter the hotel room. . . ."

Appellant's Reply Brief at 3-4.

The Court of Appeal noted that the issue of reasonable belief in consent was joined by the parties in that proceeding. The court quoted from our argument,

but then adopted respondent's position that the magistrate was required to make a factual finding that actual consent existed. The court expressly rejected our argument, and that of the magistrate below, that an officer's reasonable belief is sufficient to justify the entry. Typed opn. at 9-11. We have already discussed in our petition the cases relied on by the Court of Appeal, and will not repeat that discussion here.

As acknowledged by respondent (Brief in Opposition at 10), we presented this clear issue to the California Supreme Court in our Petition for Review: "This case presents the question of whether the Fourth Amendment requires a finding that the defendant *actually* consented to a warrantless entry, as opposed to finding that the officer's mistaken belief was reasonable." Petition for Review at 9; emphasis in original.

Respondent's contention that this issue was not raised below in a timely manner is erroneous and must be rejected. As for the other contentions in the Brief in Opposition, we feel no reply is necessary.

CONCLUSION

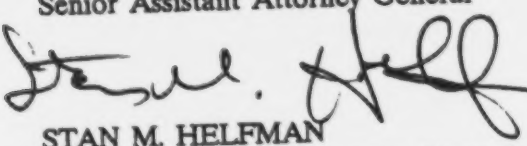
For the foregoing reasons, we respectfully request that the Petition for a Writ of Certiorari to the California Court of Appeal for the Sixth Appellate District be granted.

DATED: May 22, 1992.

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General



STAN M. HELFMAN
Supervising Deputy Attorney General
[Attorney of Record]

MICHAEL E. BANISTER
Deputy Attorney General

Attorneys for Petitioner

SMH:btr